RECENT DECISIONS.

NORMAN S. GOETZ, *Editor-in-Charge.*

ACCOUNT—ACCOUNT STATED—IMPEACHMENT WITHIN A REASONABLE TIME.—The plaintiff had received from the defendant an account covering their past dealings, and a check for the balance found. The plaintiff shortly after found that interest had been computed incorectly, but made no demand for over two years. *Held,* three judges dissenting, the plaintiff could not sue on the account. *Ripley* v. *Land Co.* (Wis. 1909) 119 N. W. 108.

An account rendered becomes an account stated, if the party to whom the account is submitted does not dissent within a reasonable time. *Towsley* v. *Denison* (N. Y. 1866) 45 Barb. 490. This presumption is only *prima facie* evidence of the correctness of the balance, being merely an inference of fact, *Bruen* v. *Howe* (N. Y. 1848) 2 Barb. 586, and the principal case errs in regarding it as a conclusive presumption of law. Payment of the balance may strengthen the inference, but likewise does not conclude the parties. *Gibson* v. *Hanna* (1848) 12 Mo. 162. Although the impeachment of accounts is not favored, *Kilpatrick* v. *Henson* (1886) 81 Ala. 464, an account may be opened on clear proof of fraud or mistake, *Ware* v. *Manning* (1888) 86 Ala. 238, or may be "surcharged or falsified" for errors affecting only specific items. *Bankhead* v. *Alloway* (Tenn. 1868) 6 Cold. 56, 75. Since an account stated is effective only as an admission, *Lockwood* v. *Thorne* (1858) 18 N. Y. 285, a party's negligence in asserting his rights should not conclusively bar his action to correct the account, *Farnum* v. *Brooks* (Mass. 1830) 9 Pick. 212. Lapse of time is generally regarded merely as evidence of the plaintiff's acquiescence in the correctness of the account. *Emmons' Adm'r.* v. *Stahlnecker* (1849) 11 Pa. St. 366; *Lockwood* v. *Thorne, supra.* However, equity will, by analogy to the Statute of Limitations, refuse to open an account if a party has been inactive for a great number of years. *Kingsley* v. *Melcher* (N. Y. 1890) 56 Hun. 547. The principal case appears unsound in holding that this absolute bar to contesting an account may arise from the lapse of such a reasonable time as will convert an account rendered into an account stated, even though such a "reasonable" time be less than the statutory period.

AGENCY—SUIT ON A SEALED LEASE BY AN UNDISCLOSED PRINCIPAL.—A principal sued for rent on a lease signed and sealed by an agent acting as such. *Held,* unless the lessee, at the time of the making of the lease, knew the identity of the principal, the latter could not sue. *Buge* v. *Newman* (1908) 113 N. Y. Supp. 198.

While none but the parties named in a sealed instrument could sue or be sued thereon at common law, contracts such as leases, *Lake* v. *Campbell* (1856) 18 Ill. 109, to the validity of which a seal was not essential encountered the exception that the seal if superfluous, might be disregarded. In this latter class of cases some jurisdictions have readily discarded the seal, *Lancaster* v. *Ice Co.* (1893) 153 Pa. St. 427, while others have refused to do so. *Pollard & Co.* v. *Gibbs* (1875) 55 Ga. 45. New York, however, takes the anomalous position of recognizing the seal of a lease, but still allowing a third person to be a party to the suit, if he has received the benefits and ratified the sealing by acts *in pais,* provided that, though the contract be not in his name, his interest appears on the face. *Schafer* v. *Henkel* (1878) 75 N. Y. 378; *Briggs* v. *Partridge* (1876) 64 N. Y. 357. But, properly, a sealed instrument could only be ratified under seal; *Bellas* v. *Hayes* (Pa. 1819) 5 S. & R. 427; nor would the receipt of benefits by a third person, not a party, ground an *assumpsit* against him, as was suggested in *Moore* v. *Granby* (1883) 18 Mo. 86, for a suit on a promise contained in a sealed instrument can be brought only on the

specialty. *Shack* v. *Anthony* (1813) 1 M. & S. 573. And see *Kiersted* v. *Orange, etc. Ry.* (1877) 69 N. Y. 343. Likewise, the apparent interest of an outside party, or the suggestion made in the principal case as to knowledge of his identtity, should not be considered, if the rule is to be applied at all. *Bushell* v. *Bevan* (1834) 1 Bing N. C. 103, 120. The principal case, theoretically, is still more questionable in view of the New York Statute lowering the seal from the dignity of a formality to the plane of creating a rebuttable presumption of consideration. The decision of the principal case, however, well illustrates the reluctance of the courts to disavow the sanctity of the seal.

AWARD AND ARBITRATION—MISTAKE OF ARBITRATORS.—The defendant contracted with the plaintiff for a cargo of rubber, any dispute on the contract to be settled by arbitration. Defendant refused the goods as not in accordance with the contract. The award sustained his contention but held that he must accept the goods at a specified reduction. There was no express statement on the face of the award that the arbitrators had applied a special custom, though there was evidence that they had done so. *Held,* the custom being bad, the award should be set aside. *Re Arbitration. North-Western Rubber Co.* v. *Huttenbach & Co.* (1908) 99 L. T. Rep. 680.

Valid awards operate as conclusive judgments, *Sweet* v. *Morrison* (1889) 116 N. Y. 19, and all reasonable intendments will be made to uphold them. *School District* v. *Sage* (1896) 13 Wash. 352. If within the terms of submission, and honestly made, they will not be set aside for errors of judgment concerning law or facts. *Consolidated Water Power Co.* v. *Nash* (1901) 109 Wis. 490. To this rule there are certain qualifications. In the absence of specific requirement, arbitrators are not bound to decide according to law, *Remelee* v. *Hall* (1859) 31 Vt. 582; *Furdickar* v. *Guardian Mutual Life Ins. Co.* (1875) 62 N. Y. 392, but where they intend so to decide, and both the intention and the mistake appear clearly upon the face of the award, it is reviewable. *Muldrow* v. *Norris* (1852) 2 Cal. 74; *Smith* v. *Sprague* (1867) 40 Vt. 43; *Patton* v. *Garrett* (1895) 116 N. C. 847. A palpable mistake of fact, such as a mistake in calculation, is a ground of avoidance, *Furdickar* v. *Guardian Mutual Life Ins. Co., supra,* but the mistake must appear on the face of the award. *Pollard* v. *Lampton* (Va. 1849) 6 Gratt 298; *Thornton* v. *McCormick* (1888) 75 Ia. 285; *Richardson* v. *Lanning* (N. J. 1856) 2 Dutch 130. Other decisions hold that a mistake not appearing on the face of the award may be corrected, where the mistake was of such a nature as to swerve the arbitrators from their true intention, *Cons. Water Power Co.* v. *Nash, supra,* such as the unconscious use of a false weight, *Boston Water Power Co.* v. *Gray* (Mass. 1843) 6 Metc. 131, and such mistake can be proven by extrinsic evidence (*Idem*). The principal case scarcely accords with the current of American authority.

BANKRUPTCY—SECURED CREDITORS—TRUSTEE'S COMMISSION.—Trustee in bankruptcy sold mortgaged property comprising all the assets of the bankrupt, without objection of the mortgagee, for a sum insufficient to satisfy the mortgage, paying the mortgagee the proceeds less the expenses of the sale and the commissions of the referee and trustee. *Held,* the trustee and referee were entitled to their commissions out of this fund. *In re Baughman* (1908) 20 Am. B. R. 811.

Where it becomes necessary for a court to take charge of property, the receiver is virtually a trustee for the benefit of those ultimately entitled to the property. *Beckwith* v. *Carroll* (1876) 56 Ala. 12; *McLane* v. *R. R. Co.* (1885) 66 Cal. 606 at 622. A receiver, by analogy to a trustee, *Rensselaer R. R. Co.* v. *Miller* (1874) 47 Vt. 146; *Morison* v. *Morison* (1855) 7 D. G. M. & G. 214, is entitled to a lien on the property in his hands for expenses reasonably incurred. *Radford* v. *Folsom* (1880) 55 Ia. 276. His claim for compensation is not against the parties, but against the property or the proceeds thereof. *Jaffray* v. *Raab* (1887) 72 Ia. 335; *Hopfensack* v. *Hopfensack* (N. Y. 1880) 61 How. Pr. 498. Referees and

trustees in bankruptcy as well as receivers generally, seem entitled to look for compensation to the property they are administering whether or not this property is sufficient to satisfy the claim of the secured creditors. *In re Crammond* (N. Y. 1906) 17 Am. B. R. 22. But a few cases, *contra,* hold that inasmuch as by the National Bankruptcy Law, the commissions of trustees and referees are payable out of the bankrupt's estate, if there are only sufficient assets to satisfy the secured creditors, the trustee and referee are entitled to no compensation, as assets necessary to satisfy a valid lien are no part of the "estate." *Matter of Anders Tel. Co.* (N. Y. 1905) 136 Fed. 995; *Smith* v. *Township* (Mich. 1906) 17 Am. B. R. 745.

CARRIERS—CARRIER'S NEGLIGENCE—ACTION IN TORT FOR EJECTION.—By mistake of the defendant's agent the plaintiff was given a ticket so marked as to identify the purchaser as a woman. The conductor would not accept this ticket, and, on the plaintiff's refusal to pay the fare, ejected him. The plaintiff sued in tort for the ejection. *Held,* he could recover. *St. Louis I. M. & S. Ry. Co.* v. *Baty* (Ark. 1908) 114 S. W. 218.

A ticket good on its face, though in fact insufficient, must be honored. *Murdock* v. *R. R.* (1884) 137 Mass. 292. Conversely a ticket obviously wrong will give the passenger no right to be on the train. *McKay* v. *R. R.* (1890) 34 W. Va. 65. His own negligence prevents recovery for ejection. *Poulin* v. *R. R. Co.* (1892) 52 Fed. 197; *contra, Georgia R. R.* v. *Dougherty* (1890) 86 Ga. 744. But a passenger who presents a bad ticket, received, without negligence, through an agent's mistake, has been allowed to recover in tort for ejection, as in the principal case. *Hot Springs R. R.* v. *Deloney* (1898) 65 Ark. 177, and cases cited. To support this result it has been said that the knowledge of the agent as to the actual contract is that of the company, which, thus informed, could not eject the passenger, and therefore could not require the conductor to do so. *Gulf etc. Ry.* v. *Rather* (1893) 3 Tex. App. 72. This is to argue that the regulation requiring the conductor to rely on the face of the ticket alone is unreasonable except in cases where the actual facts justify it. But the basis of the regulation is that the conductor cannot know or inquire into those facts. If this foundation can be removed by a legal imputation of knowledge clearly the regulation cannot stand, but it is submitted that the fallacy of the court lies in not applying the test of reasonableness to the imputation itself. A better theory for allowing the tort action would treat the breach of the company's implied warranty, that the ticket is good and acceptable on the train, as a waiver of the passenger's promise to present such a ticket. The more conservative jurisdictions, however, regard this promise of the passenger as independent, and hold that as between conductor and passenger the face of the ticket alone shall be decisive. *Townsend* v. *R. R.* (1874) 56 N. Y. 295; *Frederick* v. *R. R.* (1877) 37 Mich. 342; *Bradshaw* v. *R. R.* (1883) 135 Mass. 407. Though this rule may work hardship in some cases it tends to simplify the duties of the conductor and so to improve the general service. The passenger's rights are retained through his action in contract.

CORPORATIONS—INCREASE OF CAPITAL—SUIT BY STOCKHOLDERS.—A corporation by majority vote of its stockholders authorized its directors to form a new corporation and to transfer to it certain real estate in exchange for all its stock, such stock to be offered at par to the stockholders of the old corporation in proportion to their holdings therein. A minority stockholder sued to enjoin the sale. *Held,* two judges dissenting, that the transaction was *ultra vires,* being an evasion of the statutory provisions governing the increase of capital stock. *Schwab* v. *E. G. Potter Co.* (1908) 113 N. Y. Supp. 439.

An act within the powers of a corporation cannot be enjoined at the suit of the stockholder in the absence of fraud. 8 COLUMBIA LAW REVIEW 313. But where the majority of stockholders lawfully authorize directors of a corporation to lease property to themselves or to another corporation, the transaction will be closely scrutinized and doubts resolved in favor

of the minority. *Meeker* v. *Winthrop Iron Co.* (1883) 17 Fed. 48. Upon these grounds the result in the principal case may possibly be sustained. The transaction might perhaps have been questioned on the ground that the corporation had no power to acquire the stock of another corporation, for while stock may be taken in discharge of a doubtful debt; *First National Bank* v. *Nat'l Exchange Bank* (1875) 92 U. S. 122; *H. & G. M. Co.* v. *H. & W. M. Co.* (1891) 127 N. Y. 252; or in exchange for the entire property of a corporation when it is proposed to wind up its affairs; *Treadwell* v. *Salisbury Mf'g. Co.* (1856) 7 Gray 393; or possibly to enable the corporation to obtain money to pay a debt on the property sold, *Hodges* v. *New England Screw Co.* (1850) 1 R. I. 212, a power cannot be implied to organize and take all the stock in a subsidiary corporation paying for such subscription by deed of land. *Marbury* v. *Ky. Union Land Co.* (1894) 62 Fed. 335 at 351. But it is submitted that the principal case cannot be supported on the court's reasoning. The case involves no increase of "legal" or share capital of the original corporation, nor does the acquisition by one corporation of all the shares in another, amounting to a consolidation, increase the capital stock of the second. *Einstein* v. *Rochester Gas Light Co.* (1895) 146 N. Y. 46. The ultimate purpose of the transaction was merely to increase working capital. This is permissible. *Barry* v. *Merchants' Exchange Co.* (N. Y. 1844) 1 Sandf. Ch. 280 at 308.

EASEMENTS—PRESCRIPTION—USER GREATER THAN CLAIM.—The plaintiff, a statutory navigation company, sued to enjoin the defendant company from extracting water from a canal. The plaintiff proved that the defendant had taken water from the canal for over twenty years regardless of the level required to be maintained by statute. The defendant admitted such user and claimed a right by prescription to continue to take water above the statutory level. *Held*, the defendants had acquired no right by prescription. *Att'y Gen'l* v. *Ry. Co.* (1908) 99 L. T. 695.

The principal case appears to be based on a misapplication of the characteristic of adverse user that "the user must be consistent with the claim." Washburn, Easements (4th Ed.) 135; *Ballard* v. *Dyson* (1808) 1 Taunt 299. This characteristic was formulated from the many holdings that the easement sought to be acquired over the servient estate should be strictly limited to the burden which had been actually imposed. *Hart* v. *Chalker* (1824) 5 Conn. 311; *Holsman* v. *Spring Co.* (N. J. 1862) 1 McCarter 335 at 346. But unless the user has not been "continuous," the fact that it was greater at one period than at another is not held to make the use "inconsistent," *Cotton* v. *Mf'g Co.* (Mass. 1847) 13 Met. 429, and thus to destroy the prescriptive right to the less burdensome easement. *Baldwin* v. *Calkins* (N. Y. 1833) 10 Wend. 167; *Shaughnessy* v. *Leary* (1894) 162 Mass. 108. *A fortiori*, the fact that the use during the entire period was greater than the claim should not make such use inconsistent within the meaning of the rule. The easement claimed, moreover, cannot be attacked as in conflict with the theory of the lost grant. Theoretically, the fundamental basis of the fictitious grant is the adverse claim of right, which must be supported by a consistent user. *Colvin* v. *Burnet* (N. Y. 1837) 17 Wend. 564; *Ashley* v. *Ashley* (Mass. 1855) 4 Gray 197. Thus. while it is well established that the user must be co-extensive with the claim, *McCallum* v. *Water Co.* (1867) 54 Pa. St. 40, the principal case in invoking the reciprocal rule that the claim must be co-extensive with the user, appears to be unsound.

EQUITY—CLOUD ON TITLE—RESTRICTIVE COVENANT.—A, by a deed containing a covenant restricting the use of the land to church purposes, conveyed this land to X who, having received it virtually as a trustee for B, conveyed it to B subject to the same restrictive covenant. A bond, secured by a mortgage not containing this restriction, was given for a part of the purchase price. B sought to have A enjoined from suing on this bond until he should release the covenant. *Held*, Patterson, P. J., dis-

senting, the restrictive covenant, constituting a cloud on title, should be canceled. *St. Stephen's Church* v. *The Church of the Transfiguration* (1909) 40 N. Y. L. Jour. No. 105. See Notes, p. 257.

EVIDENCE—FAILURE TO CALL WITNESS—CREATION OF INFERENCE.—Defendant failed to call as a witness a boy, who had been on the seat with defendant's driver when the latter negligently ran over the plaintiff. *Held,* such failure to call "a stranger" gave rise to no inference whatever that had the witness been called, his testimony might have been unfavorable to the defendant. *Reehil* v. *Fraas* (App. Div. 1908) 40 N. Y. Law Jour. No. 85.

The fact of failure to call a witness is not evidence itself. *Blackman* v. *State* (1887) 78 Ga. 592. Neither does it create a presumption of law. *Sugarman* v. *Bremel* (1902) 68 App. Div. 377. Such failure may, however, give rise to a presumption of fact, viz., an inference. *Harriman* v. *Reading & Lowell R. R.* (1899) 173 Mass. 28. In this sense, it simply becomes one of the collateral facts to be taken into consideration by the jury in weighing the value of the evidence actually introduced. The limitation in the principal case that no inference can *possibly* arise where the witness is "a stranger" apparently rests exclusively on *Yula* v. *N. Y. & Queens Co. R. R.* (1902) 39 Misc. 59, but see *contra, Mitchell* v. *R. R. Co.* (1894) 68 N. H. 96, 117. This doctrine arbitrarily draws the line on "the disposition of the witness in respect to the parties or the cause" relying on the rule requiring a party to vouch for the character of his witness. This is certainly an extension of the well-settled rule that where "a friendly" witness is *also* in possession of vital facts an inference arises. *Milliman* v. *Rochester R. R. Co.* (1896) 3 App. Div. 109. A much more logical test would seem to be "the character of the facts withheld." *Rice* v. *Commonwealth* (1883) 102 Pa. St. 408; *Seward* v. *Garlin* (1861) 33 Vt. 583, 592. The relation in which the person not called stands to the party may strengthen the inference, *Whitney* v. *Ticonderoga* (1891) 127 N. Y. 40, 16 Cyc. 1062, but cannot create it. *Reynolds* v. *Sweetser* (1860) 15 Gray 78. Every inference is a deduction from the facts of common experience. It would seem that the fact that the litigant failed to produce such a witness leads more logically to the conclusion that it was from fear of weakening his case, than from the natural hesitation to give character to "a stranger." The dissenting opinion is therefore preferable.

EVIDENCE—HEARSAY—BOUNDARIES.—To prove the boundary of his land, adjoining the defendant railroad's right of way, the plaintiff offered in evidence the declarations of two deceased persons, made while acting as foremen in charge of the defendant's fences. One of the foremen, at the time his declaration was made, was the owner of the land now owned by the plaintiff. *Held,* evidence of the declarations of both foremen was admissible. *Keefe* v. *Sullivan County R. R.* (N. H. 1908) 71 Atl. 379. See Notes, p. 255.

EXECUTORS AND ADMINISTRATORS—PRIVITY BETWEEN REPRESENTATIVES IN DIFFERENT JURISDICTIONS.—A Montana administrator of the deceased was defeated in a suit to establish a lien arising from services of the deceased as attorney. *Held,* this suit was no bar to a second action on the same claim by a Massachusetts administrator. *Ingersoll* v. *Coram* (1908) 29 Sup. Ct. Rep. 92. See Notes, p. 248.

EXTRADITION AND RENDITION—HABEAS CORPUS—ARREST WITHOUT WARRANT.—A private citizen without a warranty arrested a man whom he declared guilty of a felony in another state. Upon his testimony a warrant was issued under which the accused was detained. *Semble,* in *habeas corpus* proceedings, detention under such warrant, pending requisition, was lawful. *Commonwealth* v. *Baer* (Pa. 1909) 66 Leg. Int. 68

An executive warrant issued in one state on requisition by another state as provided by the Federal law, U. S. Const. Art. II § 2; U. S. R. S.,

§§ 5278, 5279, is regarded by some courts as conclusive of the lawfulness of the dentention in the first state, 2 Moore, Extradition, § 634. Other jurisdictions declare that the executive warrant may be impeached by the requisition, *Ex parte Hart* (1896) 63 Fed. 249; *People* v. *Brady* (1874) 56 N. Y. 182, but see *In re Roberts* (1885) 24 Fed. 132, although its production cannot be compelled. *People* v. *Donohue* (1881) 84 N. Y. 438. Detention under a warrant to arrest issuing from a court prior to requisition is also lawful if it appears that the warrant is based upon evidence showing probable guilt of a felony. *Commonwealth* v. *Deacon* (1823) 10 S. & R. 125 at 135; *Morrell* v. *Quarles* (1860) 35 Ala. 544. The matter, however, is generally regulated by statute. Upon arrest without a warrant the accused must be taken before a court to determine whether he may be held under a warrant or discharged. *Harris* v. *Louisville N. O. & T. R. Co.* (1888) 35 Fed. 116. Evidence showing probable guilt of a felony appears sufficient to justify such a warrant, *State* v. *Anderson* (S. C. 1833) 1 Hill 327, *Ex parte McKean* (1878) 3 Hughes 23; but see *In the Matter of Henry* (1865) 29 How. Pr. 185, since it is the same as that upon which a warrant to make arrest is issued. Since detention under a warrant based upon such evidence is lawful, *Morrell* v. *Quarles, supra,* it would seem to make no difference whether it is issued before or after arrest. The principal case, therefore, appears sound.

GUARDIAN AND WARD—STATUS OF A GUARDIAN AD LITEM.—The plaintiff, an infant, sued in tort by a guardian *ad litem.* The complaint was verified by the latter as a party. *Held,* the guardian *ad litem* verifies as a party. *Phillips* v. *Portage Transit Co.* (Wis. 1908) 118 N. W. 539.

Although at common law an infant was required both to sue and be sued by guardian, *Clark* v. *Gilmanton* (1842) 12 N. H. 515, at present in most states an infant sues by next friend, *Chudleigh* v. *R. R.* (1893) 51 Ill. App. 491, and defends by guardian *ad litem. Wakefield* v. *Marr* (1878) 65 Me. 341. In theory both are appointed by the court, *Miles* v. *Boyden* (Mass. 1825) 3 Pick. 213, though in general any responsible person may sue as next friend without prior appointment. *Klaus* v. *State* (1877) 54 Miss. 44. And see *Guild* v. *Cranston* (Mass. 1851) 5 Cush. 506. Most jurisdictions still require the actual appointment of a guardian *ad litem* for an infant defendant, *Johnson* v. *Waterhouse* (1890) 152 Mass. 585; a few allow the general guardian to defend without appointment. *Pinchback* v. *Gray* (1883) 42 Ark. 222. The function of the next friend, or guardian *ad litem,* is not only to safeguard the infant's interests, *Sinclair* v. *Sinclair* (1845) 13 M. & W. 639, but also to accept service, etc., from the opposite party. *Clark* v. *Gilmanton, supra.* His exact status is at present anomalous. In most respects he is not regarded as a party, *Tate* v. *Mott* (1887) 96 N. C. 19, and therefore his pleadings cannot be used as evidence against the infant, *Stephenson* v. *Stephenson* (N. Y. 1837) 6 Paige 353, he cannot waive any of the infant's substantial rights, *Isaacs* v. *Boyd* (Ala. 1837) 5 Port 388; and consanguinity of the judge is not a bar to the suit. *Bryant* v. *Livermore* (1874) 20 Minn. 313 at 340. For practical reasons, however, he is, in most jurisdictions, considered as a party for such purposes as service of papers and verification. *Turner* v. *Cook* (1871) 36 Ind. 129; *Clay* v. *Baker* (N. Y. 1886) 41 Hun. 58.

HUSBAND AND WIFE—VOID MARRIAGE—ANNULMENT.—A husband having contracted a marriage, knowing it to be invalid because a former wife was alive at the time, sought to have the marriage annulled. *Held,* two judges dissenting, under statutes, the court had discretion to invoke the equitable doctrine of "clean hands," so as to bar the plaintiff from a decree in his favor. *Berry* v. *Berry* (App. Div. 1909) 40 N. Y. L. J. No. 93.

As no courts in this country have succeeded to the jurisdiction of the ecclesiastical courts, most states hold that divorce and annulment proceedings are purely statutory. *Kelley* v. *Kelley* (1894) 161 Mass. 111; but see *Rooney* v. *Rooney* (1896) 54 N. J. Eq. 231. Where a statute gives either party the right to sue for annulment the question arises

whether the statute is mandatory, see *Appleton* v. *Barber* (N. Y. 1868) 51 Barb. 270, giving either party the absolute right to sue; or whether such right is subject to the restrictions imposed by equity. If mandatory, the court has no discretion, otherwise it has the option of invoking either equitable or ecclesiastical doctrines. The courts have adopted ecclesiastical practices when called upon to imply such incidental powers indispensable to the proper exercise of the court's functions. *Higgins* v. *Sharp* (1900) 164 N. Y. 4. But this has not been followed to the extent of adopting jurisdiction in cases of canonical disability not provided for by statute. *Anon.* (1873) 24 N. J. Eq. 19. On the other hand, Equity courts will, of their own inherent jurisdiction, annul a marriage contract on grounds for which they annul contracts generally, i. e., fraud or insanity. *Waymire* v. *Jetmore* (1872) 22 Oh. St. 271; *Clark* v. *Fields* (1841) 13 Vt. 460. Consequently the court may, there, enforce the "clean hands" maxim. *S.* v. *Murphy* (1844) 6 Ala. 765. But in cases of marriage, void as bigamous, it would seem preferable to follow the ecclesiastical courts, which refuse to apply the doctrine of "clean hands." *Miles* v. *Chilton* (1849) 1 Rob. Ec. 684; *Andrew* v. *Ross* (1888) 14 P. D. 15. The refusal to annul a void marriage in no way validates it, and as in annulment proceedings the state is an interested party, it would seem more advisable to punish the offender by a criminal prosecution, than to refuse to render a decree which is at best but declaratory.

INSURANCE—BREACH OF WARRANTY—WAIVER AND ESTOPPEL.—An insurance company, with knowledge of the breach of other conditions, denied liability on the ground of the breach of only one condition. The breach of conditions not previously relied upon were set up in defense to an action on the policy. *Held*, the reliance upon the breach of only one condition constituted a waiver of the others. *Farmers All. Ins. Co.* v. *Ferguson* (Kan. 1908) 98 Pac. 231. See Notes, p. 251.

INTERPLEADED—PRIVITY—INDEPENDENT LIABILITY.—A trustee bound by contract to administer stock for the stockholders, filed a bill in equity, to which he made the stockholders and adverse claimants of the stock defendants, praying to be relieved of the trust. *Held*, because of the plaintiff's independent contract relation with the stockholders, and the lack of privity between the stockholders and the other defendants, the bill was not technically a bill of interpleader. *Moore Co.* v. *Savings and Trust Co.* (1908) 31 D. C. App. Cas. 452. See Notes, p. 252.

INTERSTATE COMMERCE—COMMISSION'S POWERS NARROWLY CONSTRUED.—The Interstate Commerce Commission conducted of its own motion an investigation in regard to the methods of certain combinations of carriers, not merely to discover any facts tending to defeat the purposes of the Interstate Commerce Act, but to aid it in recommending any additional legislation to Congress. During the investigation the appellant, being subpœnaed, appeared but refused to answer certain questions. *Held*, three judges dissenting, the Interstate Commerce Act did not authorize the Commission to invoke the aid of the courts to compel testimony in such investigations. *Harriman* v. *I. C. C.* (1908) 29 Sup. Ct. Rep. 115.

Since the Commission is neither an administrative, judicial, or legislative body, but exercises functions distinctively inherent in each, Judson, Interstate Commerce § 278; *I. C. C.* v. *Brimson* (1894) 154 U. S. 447; § 15 Act of June 29, 1906, its powers cannot be ascertained by the application of principles governing any one of these classes of bodies, but depend solely upon the provisions of the Interstate Commerce Act. Since these are very extensive, the Act has been interpreted closely, and the implication of powers generally denied. Accordingly, § 16 of the Act was construed to give the Commission no power to make reparation for past damages, *Macloon* v. *C. & N. W. Ry. Co.* (1892) 5 I. C. C. R. 84, 92, *et seq*, until the Amendment of March 2, 1889. The Commission's inability to compel self-incriminatory testimony under § 12, *Counselman* v. *Hitchcock* (1892) 142

U. S. 547, was remedied by the Amendment of February 11, 1893, and § 12 gave the Commission no power to fix a maximum rate, *I. C. C.* v. *Railway Co.* (1897) 167 U. S. 479, until amended on June 29, 1906. The decision of the principal case, restricting the Commission's powers, further exemplifies the policy of narrow construction of the Act, without involving the constitutionality of broader powers, were they conferred.

INTERSTATE COMMERCE—INJUNCTION TO RESTRAIN PROPOSED SCHEDULE OF RATES.—The defendant carriers filed with the Interstate Commerce Commission a schedule of rates to go into effect November 1, 1907. On October 1, 1907, the complainant shippers applied to the Circuit Court for an injunction to restrain the collection of such rates pending the determination of their reasonableness by the Interstate Commerce Commission. *Held*, Ross, J., dissenting, the court had jurisdiction to grant the injunction. *Union Pac. R. Co. et al* v. *Oregon & Washington Lumber Mf'rs Ass'n* (1908) 165 Fed. 13.

Prior to the enactment of the Interstate Commerce Act, a Federal court had jurisdiction to enjoin unreasonable charges and discriminations by common carriers. *Tift* v. *Southern Ry. Co.* (1903) 123 Fed. 789 at 793-95. While §§ 9 and 22 of the Act preserve all legal remedies, the Federal Supreme Court in *Texas and Pac. Ry.* v. *Abilene Cotton Oil Co.* (1907) 204 U. S. 426 has declared that the right to a common law action for damages resulting from an alleged unreasonable rate prior to action by the Commission is not preserved, since such a remedy would be inconsistent with the object of the Act and the powers given the Commission under the Act. For the same reasons it has been held that a Federal court has no jurisdiction to issue an injunction pending action on an established rate by the Commission. *Great Northern Ry. Co.* v. *Kalispell Lumber Co.* (1908) 165 Fed. 25; *Potlatch Lumber Co.* v. *Spokane Falls & N. Ry. Co.* (1907) 157 Fed. 588. The principal case, however, would not seem inconsistent with the Act, *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.* (1907) 158 Fed. 193; *dicta Southern Ry.* v. *Tift* (1907) 206 U. S. 428 at 437, nor with the powers of the Commission, since the rate enjoined was not in effect under the provisions of the Act, and so could not be acted upon by the Commission. *Jewett Bros. & Jewett* v. *C. M. & St. P. Ry. Co.* (1907) 156 Fed. 160. While the Commission can only pass upon rates in effect, *Jewett Bros. & Jewett* v. *C. M. & St. P. Ry. Co., supra*, its action is not forever prevented by enjoining the establishment of proposed rates, for the injunction is, in effect, conditioned upon the initiation of proceedings before the Commission to pass upon the reasonableness of the established rates. *Macon Grocery Co. et al* v. *Atlantic C. L. R. Co. et al* (1908) 163 Fed. 738.

LANDLORD AND TENANT—ASSIGNMENT OF TERM—RELEASE OF LESSEE.—A lessee assigned his term. *Held*, the acts of the lessor in collecting rent from the assignee and requesting him to repair the premises did not release the lessee from liability for rent. *Hooks* v. *Bailey* (Va. 1908) 62 S. E. 1054.

Unless the obligation of the lessee to pay rent rests merely on the implied promise from use and occupation of the land, *Lodge* v. *White* (1876) 30 Oh. St. 569, he is not released from this duty by assignment of his term, even with the assent of the lessor. *Ghegan* v. *Young* (1854) 23 Pa. St. 18; *House* v. *Burr* (N. Y. 1857) 24 Barb. 525. To release the lessee from his express engagement there must be a mutual agreement. *Burnham* v. *Hubbard* (1870) 36 Conn. 529, or acts from which an intention to discharge him is clearly shown, *Way* v. *Reed* (Mass. 1863) 6 Allen 364, 369, e. g. a contract to sell the property to the assignee, *O'Dougherty* v. *Remington* (N. Y. 1876) 7 Hun. 514, or an agreement upon new terms with the undertenant. *Fifty Associates* v. *Grace* (1878) 125 Mass. 161. Mere acceptance of the rent from the assignee does not show such an intention, *Harris* v. *Heackman* (1883) 62 Iowa 411; *Decker* v. *Hartshorn* (1897) 60 N. J. L. 548, since the landlord has two separate rights to the

rent. *Dwight* v. *Mudge* (Mass. 1858) 12 Gray 23, one against the lessee on his express engagement and the other against the assignee on the obligation to pay rent which runs with the land. *Walton* v. *Stafford* (1897) 14 App. Div. 310. The acceptance of rent from the assignee or even recovery against him does not, therefore, affect the lessor's right against the lessee beyond the satisfaction so received. *Seare* v. *Caldwell* (1879) 127 Mass. 242. Similarly, if the lessee has a duty to repair, since the obligation runs with the land, *Lehmaier* v. *Jones* (1905) 100 App. Div. 495, a request to the assignee to repair does not discharge the lessee. When, as in the principal case, this obligation rests on the landlord, the request to the assignee is even less significant.

LANDLORD AND TENANT—ELEVATORS—INDEPENDENT CONTRACTORS.—The employee of a tenant of an office building was injured by the negligence of the elevator operator. The elevator service was under the control of an independent company under contract with the landlord. *Held*, two judges dissenting, the landlord was liable for the negligence of the independent contractor's servant. *Scioeari* v. *Asch* (1908) 113 N. Y. Supp. 446.

When an elevator of an apartment house or office building is under the exclusive control of the landlord he is under a duty to maintain and operate it in a careful manner. Some courts define his liability as that of a common carrier. *Mitchell* v. *Marker* (1894) 62 Fed. 139; *Southern B. & L. Ass'n* v. *Lawson* (1896) 97 Tenn. 367. Others declare that his duty, resting only on the implied invitation to use, cf. 9 COLUMBIA LAW REVIEW 85, is discharged by the exercise of reasonable care. *Griffen* v. *Manice* (1901) 166 N. Y. 188; *Gibson* v. *International Trust Co.* (1900) 177 Mass. 100. Under either theory, the duty extends to all persons rightfully upon the premises, *Ellis* v. *Waldron* (1896) 19 R. I. 369; *Stewart* v. *Harvard College* (1866) 12 Allen 58; *O'Sullivan* v. *Norwood* (1887) 14 Daly 286, and a special contract with the tenant cannot affect his servant's or visitor's right against the landlord. *Springer* v. *Ford* (1901) 189 Ill. 430; *Griffen* v. *Manice, supra;* cf. Hutchinson, Carriers, §§ 1017, 1018. If the landlord's liability is that of a common carrier, he cannot relieve himself of responsibility by delegating performance to another. *Barrow Steamship Co.* v. *Kane* (1898) 88 Fed. 197. This would also seem to be the result where the duty is only that of reasonable care, for where a person is under a duty the performance of which is from its very character a nuisance or dangerous to others, he cannot cast that burden upon another. *Sulzbacher* v. *Dickie* (1876) 6 Daly 469; *Brennen* v. *Ellis* (1893) 70 Hun. 472; *Prescott* v. *LeConte* (1903) 83 App. Div. 482, aff'd 178 N. Y. 585; and see *Trustees of Canandaigua* v. *Foster* (1898) 156 N. Y. 354. Adopting either theory of the extent of the landlord's liability, therefore, the principal case appears sound.

NEGLIGENCE—INTERSECTING RAILROADS—DUTY OF ONE ROAD TO PERSONS RIGHTFULLY ON TRAINS OF THE OTHER.—The plaintiff, accompanying stock, rode on top of the stock cars after the caboose was cut off. The engine of defendant, an intersecting carrier, carelessly approached the crossing. A collision appeared imminent, the plaintiff jumped and was injured. *Held*, though the defendant was negligent to the other carrier, it could not reasonably anticipate plaintiff's presence and owed him no duty. *Richmond* v. *Ry.* (Mo. 1908) 113 S. W. 708.

If a highway crosses a track, the railroad must exercise due care, and is liable to those rightfully crossing for injuries resulting from lack of ordinary care, *Continental Co.* v. *Stead* (1877) 95 U. S. 161; *Rafferty* v. *Ry.* (N. J. 1901) 21 Am. & Eng. Ry. C. (n. s.) 778. At the intersection of the two railroads each carrier owes a similar duty to run its trains with ordinary care, not only to the other carrier but also to those rightfully upon the other trains. *Albert* v. *Sweet* (1889) 116 N. Y. 364; *Ry.* v. *Stoner* (1892) 51 Fed. 649; Elliott, Railroads, 1132. The plaintiff had a drover's pass which entitled him to ride as a passenger on the stock train. Elliott, Railroads, 1605. After all the passenger equipment had been cut

off, the plaintiff rightfully rode on top of the train, with the consent of the trainmen, and could not have been held contributorily negligent, if injured by his own carrier. *Ry.* v. *Horst* (1876) 93 U. S. 298; *Tibby* v. *Ry.* (1884) 82 Mo. 292. Accordingly, it is immaterial whether the defendant's engineer could reasonably have anticipated the plaintiff's presence either on top of the train or in any other place so long as the plaintiff had a right to be there. The plaintiff was put in a perilous position by the defendant's negligence and was not contributorily negligent in jumping. *Jones* v. *Boyce* (1816) 1 Stark 493; *Twonley* v. *Ry.* (1877) 69 N. Y. 158. The decision is to be regretted.

PLEADING AND PRACTICE—NON-RESIDENT WITNESS—IMMUNITY FROM SERVICE OF CIVIL PROCESS.—Defendant a non-resident came into this state with the double purpose of serving as a witness and attending private business. *Held*, E. J. Bartlett, J., dissenting, the witness in such circumstances was not privileged from service of summons and subsequent behavior might be used as evidencing his original intention. *Finucane* v. *Warner* (1909) 40 N. Y. Law Jour. No. 107.

In many states there are statutes prohibiting the civil arrest of parties attending court as witnesses. N. Y. Code Civ. Proc. § 860. These enactments secure not so much the privilege of the individual as the court's freedom from interference. *Cooper* v. *Wyman* (1898) 122 N. C. 84. Such statutes are supplementary to the common law immunity of non-resident witnesses from service of civil process, including arrest. *Matthews* v. *Tufts* (1882) 87 N. Y. 568. This latter immunity, although its object is also the furtherance of justice by means of procuring all available evidence, is primarily a personal privilege which may be waived. *Smith* v. *Jones* (1884) 76 Me. 138. While the arrest under the Statute is void, *Sebring* v. *Stryker* (1894) 10 Misc. 289; and an action lies against the officer making the arrest; N. Y. Code Civ. Proc. § 863; service under the common law immunity is at most voidable, *Watson* v. *Judge* (1879) 40 Mich. 729, and the officer is not so liable. *Fletcher* v. *Baxter* (Vt. 1827) 2 Aik. 224. Again, the common law privilege will not be invoked to shield one whose primary intention in coming into the jurisdiction is other than to testify. *Persse* v. *Persse* (1856) 5 H. of L. C. 671. The presumption is that the service is valid, and the party claiming the privilege must overcome it by affirmative proof. *Day* v. *Harris* (1891) 14 N. Y. Supp. 3. The process, it is true, must be either valid or voidable at the time of the service: not valid or void as claimed by Bartlett, J. Though the witness's behavior subsequent to process cannot affect its validity if the service was originally voidable, evidence of such conduct would seem admissible as reflecting the original intention of the witness.

PUBLIC SERVICE COMPANIES—REASONABLE RATE OF RETURN.—The plaintiff sued to restrain the enforcement of a rate ordinance as being confiscatory. *Held*, since the rates established will yield four per cent. dividends and two per cent. for a contingent fund, the ordinance is not unconstitutional. *Mayor et al* v. *Knoxville Water Co.* (1909) 29 Sup. Ct. Rep. 148.

While it has been held that a rate is not unreasonable which yields the company *some* return. *C. & N. W. Ry. Co.* v. *Dey* (1888) 35 Fed. 866, 878; *cf. Dow* v. *Beidelman* (1888) 125 U. S. 680, the better rule, now well established, is that the rate must yield such dividends as will be reasonable and full compensation, not on the capital stock, *Covington etc. Co.* v. *Sandford* (1896) 164 U. S. 578, but on the property of the company devoted to the public use. *Smyth* v. *Ames* (1898) 169 U. S. 466, 544. While this rule creates as many difficulties as it settles, see 8 COLUMBIA LAW REVIEW 266, it seems impossible to lay down a more definite criterion, as the question must always be one of fact depending on the circumstances of the particular case. The decisions adopting the interest rate fixed by usury laws as the standard of reasonableness, *Pa. R. R. Co. v. Phila. County* (1908) 220 Pa. St. 100, 115; *Cent. of Ga. Ry. Co.* v. *R. R. Com. of Ala.* (1908) 161 Fed. 925, 992, seem questionable, as this rate is based on

other considerations and is at best merely evidence of reasonableness. See *Consol. Gas Co.* v. *City of N. Y.* (1907) 157 Fed. 849, 870. On the other hand, the generally accepted test, adopted in the principal case, that the rate of interest to be reasonable must be not less than that prevailing in similar investments in the same locality, *Willcox et al* v. *Consol. Gas Co.* (1909) 29 Sup. Ct. Rep. 192, would be difficult of application in a community where all like enterprises were earning a similarly unreasonable return, and has the further disadvantage of making the constitutionality of the statute vary with changes in the current rate of interest. The latter difficulty, it is submitted, may be in some measure avoided by taking as the test the average rather than the current rate of interest.

REAL PROPERTY—RIGHT OF ENTRY.—Plaintiff leased to A, reserving a right of entry for condition broken. Defendant acquired a fee in part of the land under compulsory sale and lease of balance by assignment of A. Plaintiff sued to recover possession for breach of the condition. *Held,* severance of the reversion, having been by act of law, did not destroy right of entry. *Piggott* v. *Middlesex County Council* (1908) 77 L. J. Ch. 813.

Though a right of entry has been regarded both as an estate, *Austin* v. *Parish* (Mass. 1838) 21 Pick. 215, and as a chose in action, *Sexton* v. *Chicago etc. Co.* (1889) 129 Ill. 318, it is properly merely a personal right, originally reserved to facilitate the enforcement of feudal obligations, Co. Litt. 201a, to exercise an option of enforcing a forfeiture for the breach of a condition. See 9 COLUMBIA LAW REVIEW 170. The right, being personal, cannot be assigned, *Rice* v. *R. R. Co.* (Mass. 1866) 12 Allen 141, nor devised, *Southard* v. *C. R. R. Co.* (1865) 26 N. J. L. 13; *contra, Hayden* v. *Stoughton* (Mass. 1827) 5 Pick. 528, and passes to the grantor's heir by representation rather than by descent. *Upington* v. *Corrigan* (1896) 151 N. Y. 143. Being essentially entire, it cannot be apportioned—as by a severance of the reversion. Co. Litt. 215a; *Tinkham* v. *Erie Ry. Co.* (N. Y. 1866) 53 Barb. 393. It follows from the nature of the right as an option, that it is lost by a license of the breach of the condition. *Dumpor's Case* (1603) 4 Co. 119b. It is likewise destroyed by an attempted assignment. *Hooper* v. *Cummings* (1858) 45 Me. 359; *Rice* v. *R. R. Co. supra.* This result, while supportable on grounds of estoppel, *Rice* v. *R. R. Co. supra,* may, it is submitted, be better regarded simply as a penalty. Under modern statutes, see *Hoyt* v. *Ketcham* (1886) 54 Conn. 60, the right may be assigned and apportioned, and even at common law the latter seems to have been true where the apportionment was by act of law or by the act and wrong of the lessee: *Dumpor's Case, supra:* apportionability thus depending on whether the severance was the voluntary or involuntary act of the grantor. *Winter's Case* (1573) 3 Dyer 308b. The principal case is to be sustained as coming within this exception.

REAL PROPERTY—RULE AGAINST PERPETUITIES.—A will created a trust in favor of forty-two annuitants for "as long a period as legally possible." *Held,* as the testator must have intended to limit the duration of the trust to twenty-one years after the death of the last annuitant, the lives of the annuitants may be taken as the measuring lives and the trust sustained. *Fitchie* v. *Brown* (1908) 29 Sup. Ct. Rep. 106.

Under the Rule against Perpetuities, the lives by which the vesting of a future estate is postponed must be definitely designated, see *Re Moore* L. R. (1901) 1 Ch. 936, though they need not be those of beneficiaries, and may be unlimited in number, *Thellusson* v. *Woodford* (1798) 4 Ves. 227; s. c. (1805) 11 Ves. 112; *Cadewell* v. *Palmer* (1833) 1 Cl. & F. 372, so long as the dropping of the last is ascertainable. Gray, Rule Perp. (2d Ed.) § 217. But the rule being one of law and not one of interpretation is to be applied only after the intention of the testator has been ascertained from the construction of the instrument) *Speakman* v. *Speakman* (1850) 8 Hare 180; *Pearks* v. *Moseley* (1880) L. R. 5 App. Cas. 714, such con-

struction, of course, being in favor of the validity of the will. *DuBois* v. *Ray* (1866) 35 N. Y. 162. It follows that courts will struggle to effectuate the instrument by seizing on any, though slight, indication therein of an intended designation of measuring lives. *Pownall* v. *Graham* (1863) 33 Beav. 242. While the enforcement of agreements in very general terms is often refused, *Davies* v. *Davies* (1886) L. R. 36 Ch. Div. 359, yet by analogy to cases sustaining gifts of personal property "as far as the rules of law and equity will permit," Gray, Rule Perp. §§ 363-367, it would appear that a declaration of trust "as long as legally possible" is not necessarily invalid for uncertainity, though no measuring lives be explicitly specified, if from a proper interpretation of the whole instrument, the lives intended are ascertainable. On this ground the principal case may be sustained, though the finding of intention is certainly a liberal one.

SALES—WARRANTY—NON-NEGOTIABLE NOTES.—The indorsee of non-negotiable notes given a vendor, for machinery sold with a warranty, declaring upon the notes as negotiable, sued, to judgment, the maker, who interposed no defense. To this judgment as an item of the vendee's damage the vendor objected, when subsequently sued upon the warranty because of the vendee's failure to interpose his defence of non-negotiability. *Held,* for the plaintiff. *Delaney* v. *The Gt. South Bend Co.* (Kan. 1908) 98 Pac. 781.

In civil suits avoidable damages unreasonably suffered are not considered legal damage, Sedgwick, Damages (8th Ed.) §§ 201, 202. But payment of obligations induced by fraud constitutes an item of damage in a subsequent suit by the defrauded person, even though he failed to defend against a suit upon the obligation. *Whitney* v. *Allaire* (N. Y. 1874) 4 Denio 554. And payment of notes given for the purchase price in a sale of goods with warranty may be recovered in a subsequent suit upon the warranty, *Gilmore* v. *Williams* (1894) 162 Mass. 351, although, in such cases, the payment may be evidence of a waiver of the breach of warranty. *Aultman* v. *Wheeler* (1878) 49 Ia. 649 and see *Johnson et al* v. *Roy* (1901) 112 Fed. 256. Seemingly, the case would be no different where the payment has been made to the obligee's assignee, as settlement by the assignee is binding upon the assignor. *Zimmerman* v. *Zimmerman* (1883) 15 Ill. 84; *Dade* v. *Herbert* (U. S. 1802) 1 Cranch Cir. Ct. 85. The transfer by indorsement of non-negotiable notes operates, with reference to the obligor's liability, as such an assignment, *Merchants Bank* v. *Gregg* (1895) 107 Mich. 146, even where a suit upon the notes, as negotiable, has failed. *Wells* v. *Moore* (1872) 49 Mo. 299. Accordingly, the result in the principal case is sound.

TRANSFER TAX—APPOINTMENT OF ESTATES ALREADY VESTED IN APPOINTEE.—By will, which took effect before the enactment of the Transfer Tax Law, an estate was devised to the appellant on default of appointment by a prior devisee. The latter appointed by will to the appellant who refused to accept the appointment but claimed to take under the first will. The estate was taxed by order of the Surrogate. *Held,* Houghton, J., dissenting, the order should be reversed. *In re* Haggerty (1908) 112 N. Y. Supp. 1017.

The clause of the transfer tax law which provides that the failure to exercise a power of appointment subjects the property to a tax in the same manner as if the donee of the power had devised it, is inoperative, for such tax is not a tax upon the property transferred but upon the right of succession thereto. *Matter of Lansing* (1905) 182 N. Y. 238. Nor can remainders which vested previous to the enactment of the statute be assessed. *Matter of Pell* (1902) 171 N. Y. 48. And though it has never been decided the cases indicate that the same rule would be applied to contingent remainders. *Matter of Vanderbilt* (1902) 172 N. Y. 69, 73 (*semble*); *Matter of Lansing, supra,* (*semble*). In the principal case the appellant's remainder was vested. N. Y. Real Prop. Law § 30. The transfer of an estate through an appointment under a power may be properly taxed though the tax law was enacted subsequently to the creation of the power.

Matter of Vanderbilt (1900) 50 A. D. 246, 163 N. Y. 597. But acceptance is necessary to give the appointment effect, and *a fortiori*, the appointment of that estate which the appointee would have received in default of appointment is a nullity, if not accepted. *Matter of Lansing, supra.* But if it is necessary to resort to the will by which the appointment is made, before title to the property can be established, the appointment is effectual. *Matter of Delaney* (1903) 176 N. Y. 486; *Matter of Dows* (1901) 167 N. Y. 227. The appellant, however, claimed only the estate already vested in her, and therefore the principal case appears sound.

TRUSTS—DUTY OF TRUSTEE TO CONVEY—STATUTE OF USES.—Land was conveyed to a trustee to collect and pay rents to the separate use of a married woman during her life, and to convey to her appointee by will. It was in terms provided that at the death of the beneficiary the trust should cease and the land belong, in default of appointment, to her heirs. *Held,* three judges dissenting, assuming that no appointment was made by her will, the Statute of Uses did not vest title in the heirs, but a conveyance by the trustee would be necessary. *McFall* v. *Kirkpatrick* (Ill. 1908) 86 N. E. 139.

The continuation of a trust depends upon the powers and duties of the trustee. When those duties have been entirely performed the trust is terminated and the Statute of Uses passes title to the beneficiaries. *Bacon's App.* (1868) 57 Pa. St. 504. If, however, the only remaining duty is to convey the estate to the beneficiary there is a conflict of authority as to such termination of the trust. In England and the majority of the American states the single duty to convey will support title in the trustee. *Mott* v. *Buxton* (1802) 7 Ves. Jr. 201; *Dakin* v. *Savage* (1898) 172 Mass. 23; *Martling* v. *Martling* (1896) 55 N. J. Eq. 771; *contra, Adams* v. *Guerard* (1860) 29 Ga. 651; *Mitchell* v. *Mitchell* (1858) 35 Miss. 108. On principle the question is whether the conveyance is regarded as an essential duty of the trust. Thus the trust is executed if the trustee's duties are prescribed and no ultimate conveyance is expressly or impliedly directed. Reeves, Real Prop. 462. It is equally clear that an express direction to convey must be complied with before the statute can operate, though in a proper case such conveyance may be presumed. *England* v. *Slade* (1792) 4 T. R. 682. In New York, when an active trust becomes passive, the legal estate at once passes to the beneficiary, though a conveyance which has been expressly directed has not been conveyed. *Matter of Brown* (1897) 154 N. Y. 313; *Ring* v. *McCoun* (1851) 10 N. Y. 268. In the jurisdiction of the principal case the question was confused, (cf. *Kirkland* v. *Cox* (1880) 94 Ill. 400, with *Moll* v. *Gardner* (1905) 214 Ill. 248), and probably has not been set at rest. Upon the principle suggested it would seem that the minority opinion is right in contending that no conveyance was necessary as none was contemplated.

VENDOR AND PURCHASER—VENDOR'S IMPLIED LIEN.—Plaintiff, the transferee of a purchase money note, sought to have a vendor's lien established on the land, title to which the vendor retained. *Held,* the right to the lien passed with the note as an incident of the debt. *State Bank* v. *Brown* (Ia. 1909) 119 N. W. 81. See Notes, p. 261.

WATERS AND WATERCOURSES—PUBLIC RIGHT OF FOWLING.—The plaintiff claimed a public right of fowling on a navigable arm of Lake Michigan and sought to enjoin the defendant, who under claim of exclusive right had repeatedly sent its servants to row among plaintiff's decoys and frighten away the game. *Held,* that an injunction would issue. *Ainsworth* v. *Munoskong Hunting & Fishing Club* (Mich. 1908) 116 N. W. 992.

Upon the point involved there is little direct authority. Though the public right of fowling has been denied in England, *Fitzhardinge* v. *Purcell* (1908) 77 L. J. Rep. 529, that conclusion does not necessarily follow in America where the courts hold broader views concerning public rights in navigable waters. 9 COLUMBIA LAW REVIEW 174. Further, the right was there denied because not mentioned in the authorities. In an

early American case the right is spoken of as common to all by the civil law, the common law, and the law of nature. *Arnold* v. *Mundy* (1821) 6 N. J. L. 1 at 93. It does not coexist with the right of navigation where the soil under the water is owned privately. *Sterling* v. *Jackson* (1888) 69 Mich. 488. But where the state owns the soil the right is in the public. *Nee-pee-nauk Club* v. *Wilson* (1897) 96 Wis. 291. Interference with the common right of fishery has been enjoined at the suit of an individual, *Morris* v. *Graham* (1897) 16 Wash. 343, as has also interference with the common right to pass along the shore to bathe. *Barnes* v. *Midland R. R. Terminal Co.* (N. Y. 1908) 85 N. E. 1093. From these considerations it seems that the plaintiff was entitled to the relief granted.

WILD ANIMALS—LIABILITY OF OWNER—INTERVENTION OF A THIRD PARTY.—The defendant owned a dog which he knew was vicious. A third party set the dog onto the plaintiff who was bitten. *Held*, Kennedy, L. J., dissenting, the owner of the dog was bound at his peril to keep it secure. *Baker* v. *Snell* (1908) 99 L. T. 753.

In England from an early time one who knowingly kept a vicious dog was bound at his peril to keep it secure. 1 Hale C. P. 430; *Smith* v. *Pelah* (1747) 2 Str. 1264; *May* v. *Burdett* (1846) 9 Q. B. 101; Pollock, Torts, 5 Ed., 469. The duty being absolute, the owner was not freed from liability by the interventing act of a stranger. *Dixon* v. *Bell* (1816) 5 M. & S. 198; *Clark* v. *Chambers* (1878) 19 Eng. R. C. 28. In the United States courts differ. A number have followed the English rule of absolute liability. *Muller* v. *McKesson* (1878) 73 N. Y. 195; *Ahlstrand* v. *Bishop* (1899) 88 Ill. App. 424. Some have considered vicious animals nuisances *per se*, while others have based the liability on the ground that keeping such an animal after notice is in itself wilful negligence. *Jones* v. *Carey* (Del. 1891) 9 Houst. 214; 8 COLUMBIA LAW REVIEW 224. The liability is that of an insurer, and the owner does not escape it by the intervention of an agency over which he has no control. *Cleatham* v. *Shearer* (Tenn. 1851) 1 Swan 234; *Chicago etc. Co.* v. *Glass* (1889) 34 Ill. App. 364. See *Kleebauer* v. *Fuse Co.* (1902) 138 Cal. 497. Other American courts have held that proof of the viciousness, and of the owner's knowledge, are *prima facie* evidence of negligence, which apparently may be rebutted. *Hayes* v. *Smith* (1900) 62 Oh. St. 161. A few other courts have expressly refused to follow the English rule and hold the owner liable only where negligence is affirmatively proved. *DeGray* v. *Murray* (1903) 69 N. J. L. 458; *Worthen* v. *Love* (1888) 62 Vt. 285. In these latter states the ruling of the main case is doubtful, but it appears sound in a majority of American jurisdictions and in England, where it was decided.

WILLS—IMPLIED GIFTS—GIFTS OVER ON FAILURE OF CHILDREN.—A testatrix devised and bequeathed all her property to her son for life, but should he die without children to her nearest relatives. *Held*, three judges dissenting, that there was no gift by implication to the children under the circumstances. *Bond* v. *Moore* (Ill. 1908) 86 N. E. 386. See Notes, p. 259.

WILLS—LEGACY—EXECUTORS AND RESIDUARY LEGATEES.—A testator left all his property, charged with a legacy in favor of the widow and younger sons, to his elder sons, the executors, who some years later mortgaged the property to secure their own debts to a creditor who made no inquiry as to title. *Held*, the claim of the legatees must prevail. *Bank of Bombay* v. *Suleman Somji* (1908) 8 Calcutta Law Jour. 345.

Though third parties must in many respects consider executors as absolute owners of the testator's assets, *Whale* v. *Booth* (1792) 4 T. R. 625(a), such representatives are in equity merely trustees for the performance of wills. *Hill* v. *Simpson* (1802) 7 Ves. 152. While it was generally recognized in theory that the third party's rights should be determined on the principal of *bona fide* purchaser, transferees and mortgagees for consideration were protected at least against the creditors of the testator without regard to notice, *Nugent* v. *Gifford* (1738) 1 Atk. 463; *Taner* v. *Ivie*

(1752) 2 Ves. Sr. 466, especially if the executor was also the residuary legatee, *Graham* v. *Drummond* (1896) 1 Ch. 968; *Scott* v. *Tyler* (1788) 2 Dick. 712, unless there was some notice other than the nature of the transaction, *Taylor* v. *Hawkins* (1803) 8 Ves. 209, or merely an equity was obtained, *In re Morgan* (1881) L. R. 18 Ch. D. 93, or the executor still had recourse to the property, *Noble* v. *Brett* (1858) 24 Beav. 499, legatees being distinguished from creditors on the ground of a specific lien in the former. *Mead* v. *Lord Orrery* (1745) 3 Atk. 235. The accident that the executor is also residuary legatee should make no difference. *In re Queale's Estate* (1886) 17 L. R. Ir. 361. He acquires full title only when all debts, charges and legacies are paid. *Matter of Mullon* (1895) 145 N. Y. 98. Where the executor deals with the assets for his private purposes, the nature of the transaction should be considered notice. *Haynes* v. *Forshaw* (1853) 11 Hare 93. The real test is whether one dealing with him can be charged with fraud in concerting a *devastavit*. Roper's Law of Legacies (2nd. Am. Ed.) 452. Under such a rule it would seem that a creditor guilty of laches would be denied relief, while the transferee must always be bound by charges, such as legacies in the will. Cf. *Hill* v. *Simpson, supra.* The principal case is sound as there was notice. *Patnam* v. *Harland* (1881) L. R. 17 Ch. D. 353.